

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

KARRI STREET,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. C14-853-TSZ-JPD

REPORT AND
RECOMMENDATION

Plaintiff Karri Street appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her application for Disability Insurance Benefits (“DIB”) under Titles II of the Social Security Act, 42 U.S.C. §§ 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be reversed and remanded.

I. FACTS AND PROCEDURAL HISTORY

At the time of her alleged onset, plaintiff was a 49 year-old woman with a college degree. Administrative Record (“AR”) at 60, 28. Her past work experience includes employment as a massage therapist. AR at 28. Plaintiff was last gainfully employed in 2011. AR at 14.

1 On December 6, 2011, plaintiff filed an application for DIB, alleging an onset date of
2 September 1, 2011. AR at 12. Plaintiff asserts that she is disabled due to degenerative arthritis
3 of the left shoulder status post rotator cuff repair. AR at 14.

4 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 12.
5 Plaintiff requested a hearing which took place on January 13, 2013. AR at 24-48. On
6 February 21, 2013, the ALJ issued a decision finding plaintiff not disabled and denied benefits
7 based on his finding that plaintiff had no severe impairments. AR at 12-19. Plaintiff's
8 administrative appeal of the ALJ's decision was denied by the Appeals Council, AR at 1-4,
9 making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42
10 U.S.C. § 405(g). Plaintiff timely filed the present action challenging the Commissioner's
11 decision. Dkt. 1.

12 II. JURISDICTION

13 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
14 405(g) and 1383(c)(3).

15 III. STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
17 social security benefits when the ALJ's findings are based on legal error or not supported by
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
19 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
20 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
22 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
23 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
24 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a

1 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
 2 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
 3 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
 4 must be upheld. *Id.*

5 The Court may direct an award of benefits where "the record has been fully developed
 6 and further administrative proceedings would serve no useful purpose." *McCartey v.*
 7 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
 8 (9th Cir. 1996)). The Court may find that this occurs when:

9 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
 10 claimant's evidence; (2) there are no outstanding issues that must be resolved
 11 before a determination of disability can be made; and (3) it is clear from the
 record that the ALJ would be required to find the claimant disabled if he
 considered the claimant's evidence.

12 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
 13 erroneously rejected evidence may be credited when all three elements are met).

14 IV. EVALUATING DISABILITY

15 As the claimant, Ms. Street bears the burden of proving that she is disabled within the
 16 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
 17 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
 18 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
 19 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
 20 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments
 21 are of such severity that she is unable to do her previous work, and cannot, considering her age,
 22 education, and work experience, engage in any other substantial gainful activity existing in the
 23 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
 24 99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
7 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
8 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
9 or more medically severe impairments, or combination of impairments, that limit her physical
10 or mental ability to do basic work activities. If the claimant does not have such impairments,
11 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
12 impairment, the Commissioner moves to step three to determine whether the impairment meets
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
20 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
21 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is

22
23 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

1 true, then the burden shifts to the Commissioner at step five to show that the claimant can
 2 perform other work that exists in significant numbers in the national economy, taking into
 3 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
 4 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
 5 claimant is unable to perform other work, then the claimant is found disabled and benefits may
 6 be awarded.

7 V. DECISION BELOW

8 On February 21, 2013, the ALJ issued a decision finding the following:

- 9 1. The claimant meets the insured status requirements of the Social
 10 Security Act through March 31, 2016.
- 11 2. The claimant has not engaged in substantial gainful activity since
 12 September 1, 2011, the alleged onset date.
- 13 3. The claimant has the following medically determinable impairment:
 14 mild degenerative arthritis of the left shoulder status post rotator cuff
 15 repair.
- 16 4. The claimant does not have an impairment or combination of
 17 impairments that has significantly limited (or is expected to
 18 significantly limit) the ability to perform basic work-related activities
 for 12 consecutive months; therefore, the claimant does not have a
 severe impairment or combination of impairments.
- 19 5. The claimant has not been under a disability, as defined in the Social
 20 Security Act, from September 1, 2011, through the date of this
 21 decision.

22 AR at 14-19.

23 VI. ISSUES ON APPEAL

24 The principal issues on appeal are:

1. Whether the administrative law judge (ALJ) properly determined that Plaintiff,
 Karri Street's back, neck and hip conditions were not medically determinable
 impairments.
2. Whether the ALJ correctly determined that Ms. Street did not have any severe
 impairments at step two of the sequential evaluation process.

3. Whether the ALJ correctly evaluated the testimonial evidence.

4. Whether the ALJ correctly evaluated the medical opinion evidence.

Dkt. 10 at 1.

VII. DISCUSSION

One issue is dispositive of this appeal. The ALJ erred at Step 2. In what seems to be a rush to judgment, the ALJ completely bypassed the Step 2 analysis. At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). “An impairment or combination of impairments can be found ‘not severe’ *only if the evidence establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s ability to work.’”* *Smolen*, 80 F.3d at 1290 (quoting Social Security Ruling (SSR) 85-28) (emphasis added). “[T]he step two inquiry is a de minimis screening device to dispose of groundless claims.” *Id.* (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)).

To reach the conclusion that plaintiff had no severe impairments, the ALJ rejected the opinions of State DDS physicians who opined that although plaintiff would not be disabled, she had severe impairments; ignored the findings of chiropractors treating plaintiff on the basis that they are not acceptable medical sources; ignored the testimony of plaintiff’s husband, and instead, substituted his own medical opinion. He then applied his own version of “judicial notice” to find plaintiff lacked credibility because she took a trip to Europe, and reasoned that surely she would have been able to stand in long lines without problems.²

² The plaintiff appeared before the ALJ at the administrative hearing, yet the ALJ chose to ask her no questions about whether she required accommodations on the trip. This trip,

1 The ALJ also ignored the fact that plaintiff has been a massage therapist for 17 years, and
 2 apparently liked her job. In fact, she liked her job so much that she continued to attempt to
 3 perform her work as a therapist after her injury, using only one hand. This attempt did not
 4 amount to “substantial gainful employment.” However, it was used to cast doubt on plaintiff’s
 5 credibility.

6 The injury sustained by the plaintiff and the resulting pain and follow-up surgery had
 7 more than a “minimal effect” on plaintiff’s ability to work. Indeed, the combination of the two
 8 may very well preclude her current employment as normally performed.³

9 All of this, of course, does not mean that the plaintiff will be found disabled. Indeed, it
 10 may be difficult to conclude at the end of the day that plaintiff, who has a college degree and
 11 may only be limited due to her shoulder and back, is unable to perform other representative jobs
 12 existing in significant numbers in the national economy. Under the social security regulations,
 13 the fact that the plaintiff may not be able to resume her previous relevant work does not preclude
 14 an ultimate finding of “not disabled.” However, before making any such finding, the ALJ must
 15 follow the five step sequential process set out above. The ALJ did not.

16 The ALJ erred at Step 2. This matter should be remanded to the ALJ to conduct a
 17 complete *de novo* review.

18 VIII. CONCLUSION

19 For the foregoing reasons, the Court recommends that this case be REVERSED and
 20 REMANDED to the Commissioner for further proceedings not inconsistent with the Court’s
 21 instructions. A proposed order accompanies this Report and Recommendation.

22 _____
 23 however, became a major basis for finding her less credible, again reflecting a rush to
 judgment by the ALJ.

24 ³ If the ALJ believes someone can perform as a massage therapist using only one arm,
 and do so consistently with the DOT, then the ALJ should call a VE to so indicate.

